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No. 82-632

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, ET AL., PETITIONERS

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners contend that the court of appeals erred in holding that the Army's decision to contract out certain functions performed by its civilian employees was "committed to agency discretion by law" and therefore was not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701(a)(2).

1. This case arises out of the Department of the Army's June 26, 1980 decision to contract out to private enterprise certain housing, maintenance, supply, service, and transportation functions performed by the Directorate of Industrial Operations and Housing at Fort Gordon, Georgia. Prior to making the contracting out decision, the Army undertook a study to determine the most efficient and cost-effective means of performing these functions in-house, and

solicited and received cost proposals from private contractors for the performance of the functions. As a result, the Army determined that the proposal offered by Pan American World Airways was the least costly and that it would yield approximately $32 million in savings over a 58-month period. Pursuant to the statute at issue here, the results of the Army's study were reported to Congress. The Army's tentative decision to contract out to Pan Am also was reported to Congress. Congress raised no objections to either the in-house cost calculations or the decision to contract out. Pet. App. 3a-4a.

After the contract was awarded to Pan Am, reduction-in-force notices were sent to 618 civilian employees at Fort Gordon, including the three individual petitioners.[1] These petitioners, joined by the local branch of their union, then filed suit in the United States District Court for the Southern District of Georgia to enjoin the Army from contracting out the work to Pan Am (Pet. App. 4a-5a). Petitioners alleged that the conversion of the Directorate's commercial and industrial functions from Army personnel to Pan Am violated Section 806(a) of the Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, 93 Stat. 813, 10 U.S.C. (Supp. III) 2304 note. Specifically, petitioners claimed that the Army violated Section 806(a)(1) and (a)(2)(A) of the Act by contracting out these functions in order "to circumvent a civilian personnel ceiling" and by not basing its calculation for the performance of the functions in-house "on an estimate of the most efficient and cost effective organization for in-house performance." Pet. App. 26a-27a.

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[1]The Army's contract with Pan Am required Pan Am to offer the displaced employees the right of first refusal for available positions for which they were qualified. Each of the individual petitioners was offered a position with Pan Am. Pet. App. 4a n.7.

The district court dismissed petitioner's complaint for lack of jurisdiction, concluding that the Army's conversion decision was not subject to judicial review (Pet. App. 16a-18a).[2] The court of appeals affirmed, holding (*id.* at 6a-9a) that the Army's decision to contract out fell within the "committed to agency discretion" exception to judicial review contained in 5 U.S.C. 701(a)(2).

2. a. The decision below does not conflict with any decision of this Court or any other court of appeals. To the contrary, as the court of appeals noted (Pet. App. 7a-8a), every court that has addressed the issue has held that conversion decisions made by Department of Defense officials under OMB Circular A-76, 44 Fed. Reg. 20556 (1979), revised, 45 Fed. Reg. 69322 (1980), the predecessor to Section 806(a), are insulated from judicial review. For example, in *Local 2855* v. *United States*, 602 F.2d 574, 581 (1979), the Third Circuit held that because the Circular failed "to provide meaningful criteria against which a court may analyze the Army's [contracting out] decision," that decision was not reviewable by the courts.[3]

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[2]The district court also concluded that petitioners lacked standing to bring suit (Pet. App. 18a-20a). The standing issue was not addressed by the court of appeals (*id.* at 9a).

[3]Petitioners suggest (Pet. 7-8 n.18) that the court below erred in relying on cases that construed the Circular. As the court of appeals observed (Pet. App. 7a), however, "Section 806 in no way affected the nature of the conversion decision and imposed no new standards to guide the military's discretion. Except for the requirements of congressional notification and reporting, there were no restrictions on conversions in Section 806 that are not in OMB Circular A-76. Indeed, the OMB Circular is far more detailed and offers far more by way of guidelines for decisions than does Section 806." Accordingly, for the purpose of determining whether the contracting out decision is "committed to agency discretion by law," petitioners' position is not advanced by any distinctions between the Circular and Section 806.

b. Petitioners' disagreement (Pet. 6-9) with the court of appeals' decision is with its application of three specific criteria for determining whether certain administrative action has been committed by law to agency discretion. But this Court has only recently declined to review the validity of those criteria, and there is no reason for a different result here.

In *Bullard* v. *Webster*, 623 F.2d 1042 (1980), cert. denied, 451 U.S. 907 (1981), the Fifth Circuit held that 5 U.S.C. 701(a)(2) foreclosed judicial review of the FBI's decision to transfer an agent from one office to another. In so holding, the court observed (623 F.2d at 1046) that "agency action is committed to the agency's discretion and is not reviewable when an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed. * * * There must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process." More specifically, the *Bullard* court relied on the Third Circuit's decision in *Local 2855* v. *United States, supra*, for the following criteria of nonreviewability (623 F.2d at 1046):

> (1) the broad discretion given an agency in a particular area of operation, (2) the extent to which the challenged action is a product of political, economic or managerial choices that are inherently not subject to judicial review, and (3) the extent to which the challenged agency action is based on some special knowledge or expertise.

The court below simply applied the foregoing criteria to the facts of the present case. See Pet. App. 6a-7a. Accordingly, this case presents no issue warranting this Court's review.

c. Contrary to petitioners' assertion (Pet. 5), the court of appeals' interpretation of 5 U.S.C. 701(a)(2) is not inconsistent with *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Court held that Congress intended the "committed to agency discretion" exception to judicial review contained in Section 701(a)(2) to be applicable where " 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " 401 U.S. at 410, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). The exception was inapplicable in *Overton Park* because the statute in question there established clear and specific standards to guide the exercise of agency discretion. See 401 U.S. at 411.[4] By contrast, such standards are notably absent from Section 806 of the Department of Defense Authorization Act, 1980.

As the court of appeals noted, its "review of the legislative history convince[d it] that the overriding concern of Congress was to provide for increased congressional review and oversight of conversion decisions" (Pet. App. 7a n.13), rather than to establish standards to guide the Secretary's exercise of discretion in making the actual conversion decisions (see *id.* at 7a-8a). Moreover, as the Third Circuit noted in *Local 2855* v. *United States, supra*, 602 F.2d at 581 (emphasis added), "the scales are weighted heavily *against* continuation of in-house operations by the Army." Indeed, in-house operations constitute an exception to the "general policy of the Government to rely on competitive private enterprise to supply the products and services it needs." 44

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[4]Both Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act provided that the Secretary of Transportation " 'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . .' " 401 U.S. 411, quoting 23 U.S.C. (Supp. V 1965-1969) 138; 49 U.S.C. (Supp. V 1965-1969) 1653(f).

Fed. Reg. 20558 (1979). In these circumstances, "[t]he absence of fixed standards reflects an understanding that the type of decision made by the Army here is necessarily a matter of judgment and managerial discretion, and is by and large an inappropriate subject for judicial review." 602 F.2d at 582-583.

d. Although the court of appeals did not reach the issue (Pet. App. 9a), we note our agreement with the district court's alternative holding (*id.* at 18a-19a) that dismissal of this action was also necessary because petitioners lacked standing to challenge the Army's contracting out decision. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), the Court held that in order to have standing to challenge an administrative action, a party must show not only that it was injured in fact by the action (*id.* at 152), but also that the interest it seeks to protect "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (*id.* at 153). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977).

Here, neither Section 806(a)(1)'s prohibition of conversions carried out for the purpose of circumventing civilian personnel ceilings nor Section 806(a)(2)(A)'s requirement that the Secretary of Defense notify Congress that he is studying a possible conversion was intended to protect petitioners' interest in maintaining civilian employment with the Army. Rather, as the district court noted (Pet. App. 19a), "[t]he clearly stated zone of interest to be protected by the statute * * * is reserved to the Congress. The interests there are cost effectiveness, military efficiency, and the right of Congressional review and decision." See also Pet. App. 7a n.13. Since petitioners' interest in maintaining

employment with the Army is not within any zone of interest that Section 806 was designed to protect, they lacked standing to bring this suit and the district court correctly dismissed the action on that ground.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]As petitioners have observed (Pet. 11-13 & n.29), although Section 806(a) expired with the close of fiscal year 1980, substantially similar provisions were contained in Section 502(a) of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1086, 10 U.S.C. (Supp. V) 2304 note. We note, however, that the significance of the question presented by this case is diminished by the fact that Section 502(a) applies only to the conversion of functions that were being performed by Department of Defense personnel on October 1, 1980.

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